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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM,
Respondent.

On Writ of Certiorari to the Court of Appeals of Alabama.

## BRIEF

**On Behalf of Respondent to Petition for Writ of Certiorari.**

### CITATION TO OPINION BELOW.

The opinion of the Alabama Court of Appeals is reported at ... Ala. App. ..., 161 So. 2d 796, and is set forth in the appendix to petitioner's brief and application for writ of certiorari at appendix page 1a.

### STATEMENT IN OPPOSITION TO JURISDICTION OF THE COURT.

Petitioner has not been deprived of rights, privileges, and immunities secured by the Constitution of the United States.

## STATEMENT.

As set forth in petitioner's statement (p. 4), the petitioner was charged and convicted below for violation of Sections 1142 (as amended by Ordinance No. 1436-F) and 1231 of the General City Code of Birmingham.

The complaint charging petitioner was framed in two counts as set out in petitioner's statement (p. 4). Count one complained that the petitioner, as part of a group, blocked the free passage over a sidewalk in the City of Birmingham. Count Two complained that the petitioner failed to obey a lawful order, signal or direction of a police officer.

The following facts were established by the evidence introduced in the trial court. On April 4, 1962, at about 10:30 A. M., Officer Robert E. Byars, Jr., observed the petitioner, along with James Phifer and three or four other people walking South on 19th Street toward 2nd Avenue, North, Birmingham, Alabama (R. 17, 20). Officer Byars then entered Newberry's Department Store at its alley entrance and walked to the front of the store at 19th Street and 2nd Avenue (R. 17, 18). When he got to the front entrance he saw the petitioner standing in a group of ten or twelve people (R. 18, 28, 40). They were on the Northwest corner of 2nd Avenue and 19th Street (R. 18, 28, 40). The group was standing, listening and talking (R. 18). The traffic light changed a number of times while they stood there at the intersection (R. 38). The group blocked pedestrian traffic to such an extent that some people walking east on the north side of 2nd Avenue had to walk into the street to get around the group (R. 18, 21, 29). Petitioner was a member of the group (R. 18, 28, 35, 42, 51, 61, 62, 76). Officer Byars watched the group for a minute to a minute and a half (R. 19, 28, 29). Officer Byars then walked up to the group and informed them they would have to move on and clear the sidewalk

so as to allow free passage and not obstruct pedestrian traffic (R. 19, 28, 29). A small number in the group moved but that was all. Petitioner did not move (R. 19, 42, 51, 62, 76). After a short while, the officer informed the group a second time they would have to move and not obstruct the sidewalk in order to permit pedestrian traffic to move unhampered (R. 19). Petitioner and some others in the group did not move and petitioner stated: "You mean to say we can't stand here on the sidewalk?" (R. 19, 30). Officer Byars did not do or say anything for a short period and then he told the group that he was telling them the third and last time to move or they would be arrested for obstructing the sidewalk (R. 19, 30, 62). Petitioner was still in the group (R. 19, 30, 35, 42, 51, 61, 62, 76). There was still some eight to twelve people in the group when told to move the third time (R. 19, 30, 35, 42, 51, 61, 62, 76). Petitioner did not move but made the statement: "You mean to tell me we can't stand here in front of this store?" (R. 19). Officer Byars then informed petitioner that he was under arrest, after which time petitioner moved away saying: "Well, I will go into the store" (R. 19, 21, 43, 54). At this time the rest of the group began moving away (R. 54). Officer Byars followed petitioner into Newberry's Store and took him into custody (R. 19, 20). Petitioner asserts in his statement that James Phifer was arrested simultaneously with Shuttlesworth, but this is not so. The circumstances of James Phifer's arrest are as follows: After taking Shuttlesworth into custody, Officer Byars took him to the west curb to await transportation to city jail (R. 20, 34). While awaiting the transportation James Phifer walked up and began talking to the petitioner (R. 20, 34). He was told that petitioner was under arrest and that he could not talk to him. He was instructed three times to move away from petitioner before he was arrested (R. 20, 34). Obviously the Alabama Court of Appeals found from the evidence that James Phifer was not arrested for

obstructing the sidewalk, but for talking to petitioner, and failing to leave when so instructed. Under the circumstances, it is clear that no traffic situation existed at that time and therefore no violation was established under either Section 1142 as amended or Section 1231.

## STATEMENT IN OPPOSITION TO QUESTIONS PRESENTED.

1. Petitioner was convicted on a record containing ample evidence of his guilt and therefore was not denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner was convicted under ordinances which as applied to his conduct were not unconstitutionally vague under the Fourteenth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the ordinances set out in Petitioner's application this case also involves Section 1230 of the General City Code of Birmingham:

**Police to direct traffic; directing in event of fire or emergency.**—It shall be the duty of the police department to enforce the provisions of this chapter. Officers of the Police Department are hereby authorized to direct all traffic either in person or by means of visible or audible signal or sign in conformance with the provisions of this chapter; provided, that in the event of a fire or other emergency or to expedite traffic or safeguard pedestrians, officers of the police or fire department may direct traffic, as conditions may require, notwithstanding the provisions of this chapter.

Section 1230 is involved in this case because when it is construed in pari materia with Section 1231, it limits or restricts the scope of Section 1231 to traffic situations.

## ARGUMENT.

Petitioner, Fred L. Shuttlesworth was convicted of violating Sections 1142 and 1231 of the General City Code of Birmingham, Alabama.

Section 1142 of the General City Code of Birmingham, Streets and Sidewalks to be kept open for free passage reads:

> "Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the City with any animal or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such street or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.
>
> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the City after having been requested by any police officer to move on."

Section 1231 of the General City Code of Birmingham, Obedience to Police, reads as follows:

> "It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

There are only two questions which petitioner contends are presented to this Court for review. Petitioner's questions are stated as follows:

"1. Whether petitioner was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States by his conviction on a record containing no evidence of his guilt.

"2. Whether petitioner was also denied due process of law by his conviction under ordinances which as applied to his conduct are unconstitutionally vague, under the Fourteenth Amendment."

**First Question.**

Let us now determine whether or not there was sufficient evidence to justify petitioner's conviction and afford him his full rights under the "due process" clause of the Fourteenth Amendment.

It may well be that a defendant is protected by the Constitution from conviction on a record without any evidence of guilt. This is not the case here. The evidence in this case is overwhelmingly in support of the trial court verdict. Appellant raised this question in the Circuit Court by a motion to exclude the evidence. He assigned its overruling as error. Naturally, a motion to exclude the evidence will not lie if there is sufficient evidence to support conviction. The rule in this regard in Alabama is that no error results from the overruling of a motion to exclude where the evidence presents a question for the jury and is sufficient to sustain conviction. **Drummond v. State**, 37 Ala. App. 308, 67 So. 2nd 280. A similar rule is expressed in **Inland Power and Light Company v. Grieger**, 91 F. 2d 811, where we find:

"In considering the evidence, we must consider only that which is most favorable to Appellees, with every inference of fact that might be drawn from it. Maryland Casualty Co. v. Jones, 279 U. S. 792, 49 S. Ct. 484, 73 L. Ed. 960."

It is clear that both the Alabama rule in regard to "motions to exclude the evidence" and the Federal rule

in regard to the consideration of the evidence and the inferences to be drawn therefrom, are simply giving recognition to the fact that the trial judge is in a much better position to weigh and evaluate contradictory testimony. The Appellate Courts are simply not in a position to fairly make such a determination; and consequently, the foregoing rules were formulated to place this burden where it logically belongs.

Seldom is a record presented to this honorable court or any other Appellate Court that does not contain contradictory evidence as to distances, number of persons involved or other matters not mentally noted when observed. In this case the evidence, although possibly disputed, shows the petitioner was standing in a group of ten or twelve people (R. 18, 28, 40), that they stood on the corner of 2nd Avenue and 19th Street (R. 18, 28, 40) through several changes in the traffic light (R. 38), and that the group, including petitioner, blocked the sidewalk to such an extent that other pedestrians using the sidewalk had to walk out into the street in order to get around the group (R. 18, 21, 29). Officer Byars watched the group for a minute to a minute and one-half (R. 19, 28, 29) and then walked up to the group and informed them they were blocking the sidewalk and to move (R. 19, 28, 29). After a short while Officer Byars told the group a second time they would have to move (R. 19). Petitioner and others in the group failed to move (R. 19, 30). A short time later Officer Byars told petitioner and his group a third time to move and upon petitioner's failure to comply he was arrested (R. 19). There were still eight to twelve persons in the group when told the third time to move (R. 19, 30, 35, 42, 51, 61, 62, 76). Petitioner did not move after being told the third time that the sidewalk was blocked, but indicated a determination not to move by stating: "You mean to tell me we can't stand here in front of this store?" (R. 19). At this time Officer Byars arrested petitioner (R. 19).

Section 1142 as amended and Section 1231 have been set out earlier in this brief. Since the evidence must also be sufficient under the counts charging the violations, we shall consider the evidence in light of the complaint.

Count One is essentially as follows:

> "Comes the City of Birmingham . . . and complains that F. L. Shuttlesworth, . . . did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk . . . or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on . . ."

It is clear that under count one of the complaint the evidence was sufficient.

Petitioner in his brief does raise one other proposition which should be discussed. He argues that there was no obstruction as contemplated by Section 1142 as amended. In order to properly define the term "obstruct" as used in Section 1142 as amended, the Court should first determine the objects of the statute and then direct its definition of the term toward those ends. **State v. Lucas**, Miss., 221 Miss. 538, 73 So. 2d 158. In the light of this rule, it is clear that "obstruct" does not mean a total or complete blocking of the sidewalk. This is apparent from the language used in the ordinance as well as the objects sought to be attained by this regulation. The term "obstruct free passage" definitely contemplates something less than a total or complete blocking of pedestrian traffic. All that is required is that the "free passage" of pedestrians be hindered or impeded. The object of the regulation is to permit freedom of travel to pedestrians walking along the sidewalk.

Obviously no complete blocking of pedestrian traffic is contemplated. Even where large crowds gather to listen

to speeches there is no complete blocking of movement. It is possible at the largest of these assemblages to squeeze through the crowd. Clearly the word "obstruct" in the context in which it is used and the object sought to be attained means no more than to hinder or impede the passage of persons on the sidewalk. If the term "free" as used in "free passage" has any meaning at all it must be construed so as to limit the term "obstruct" as indicated.

Petitioner sets out a portion of the testimony, contending it establishes that there was no obstruction. The portion of the testimony set out by petitioner does not even support an inference that there was no obstruction of passage. In fact, if we enlarge just slightly upon the portion of the record set out in petitioner's brief, we find it completely inconclusive of anything.

"Q. Now, Mr. Byars, they were standing about where you drew that little x mark?

A. That is where the defendant, Shuttlesworth, was.

Q. Well, we are only concerned with these defendants, Mr. Byars. We don't know what other persons made up the crowd.

A. Would you restate the question?

Q. I saw (six) assuming the defendants were standing where you drew that little mark there, that would have left more than half of your north-south cross-walk free, would it not?

A. That is true.

Q. And they didn't block the east-west cross-walk at all, did they?

A. They did not" (R. 22, 23).

From the foregoing it is uncertain whether the witness was just describing that portion of the sidewalk blocked by the petitioner and James Phifer or the entire group. Petitioner and Phifer were the only ones on trial and it

is quite likely the witness was telling about the portion of sidewalk blocked by these two persons, exclusive of the crowd. This seems the only logical conclusion in light of counsel's statement to the witness: "Well, we are only concerned with these defendants, Mr. Byars. We don't know what other persons made up the crowd."

A. In the case before this Honorable Court it was not essential that petitioner, by himself constitute an obstruction. If his conduct in unison with that of his companions caused an obstruction, then he was guilty. It will be noted that the second paragraph of Section 1142 as amended specifically covers such a situation:

> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. . . ."

It is clear under the terms of the ordinance that the petitioner could not stand or loiter with his companions so as to obstruct the free passage of pedestrians without being in violation of Section 1142 as amended. The evidence is clear that petitioner was a member of a group that was standing and listening and talking (R. 19). It is equally clear that petitioner considered himself a part of this group because when told to move on the second occasion petitioner stated: "You mean to say we can't stand here on the sidewalk" (R. 19, 30)? Common sense and logic dictate that this police officer, after observing this group for about one and one-half minutes, could tell that petitioner's group was all together. The only other conclusion that could be drawn is that those persons allegedly not in the group were either themselves obstructed by petitioner's group or had stopped to listen to them talk. In either event the conclusion is inescapable that petitioner was in violation of Section 1142 as amended.

Let us now turn to count two of the complaint to see if the evidence presented is sufficient under this count. Count Two is essentially as follows:

> "Comes the City of Birmingham . . . and complains that F. L. Shuttlesworth . . . did refuse to comply with a lawful order, signal or direction of a police officer . . ."

The "lawful order, signal or direction" in this case directed the petitioner to "move on". Under the circumstances existing at the time of the order, it was certainly lawful.

The general scope and authority of a police officer in giving orders in the performance of his duty was discussed in **State v. Taylor**, 119 A. 2d 36, 38 N. J. Super. 6, in the following language:

> ". . . The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In performance of their duties they may give reasonable directions.' People v. Nixon, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace." People v. Galpern, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785 (Ct. App. 1932).
>
> "Failure to obey a police order to 'move on' can be justified only where the circumstances show conclu-

sively that the order was purely arbitrary and was not calculated in any way to promote the public order. As was said in the Galpern case, the courts cannot weigh opposing considerations as to the wisdom of a police officer's directions when he is called upon to decide whether the time has come in which some directions are called for."

The evidence in this case revealed that petitioner and his group not only obstructed the sidewalk, but obstructed it to such an extent that people using the sidewalk had to walk out into the street to get around the group. Petitioner's conduct was such as to cause an interference with vehicular traffic as well as pedestrian traffic, and was well within any limitation imposed by virtue of Section 1231 being located in the Chapter of the City Code titled "Traffic". **Phifer v. City of Birmingham**, ... Alabama App. ..., 160 So. 2d 898.

Under his first question petitioner argues that the real reason for his arrest was because of his civil rights activities in the City of Birmingham. He implies that he was unable to put into evidence the fact that there was a selective buying campaign going on in Birmingham on the part of the Negro community. It is immaterial whether the sustaining of an objection to such evidence would be error because the fact of a selective buying campaign was introduced into evidence as shown at pages 25, 26, 66, 81, 125 and 136 of the transcript. Petitioner cannot complain of any error in this regard because his questions were answered and these answers were considered by the court.

Not only was petitioner not arrested for his civil rights activities, but it can logically be argued that because of his civil rights activities, he actively sought arrest to further those same ends. In other words he had a better motive to seek arrest than did the traffic officer who ar-

rested him. Each time petitioner has been arrested for any offense, it can reasonably be contended that it enhanced and increased his prestige in all his civil rights activities, and quite likely increased his potential for acquiring contributions to support these activities.

**Second Question.**

Petitioner's second point or question is equally without merit. He contends that Sections 1231 and 1142 as amended are vague in their application to his conduct; and consequently, deprive him of rights protected by the Fourteenth Amendment.

If, as contended by petitioner, his only offenses were talking back to the officer and taking part in Civil Rights activities, then clearly the application of these ordinances to his conduct would be unconstitutional. The facts just don't bear this out. By coincidence, as the record shows, the petitioner did talk back to the officer at the same time he was committing the offense charged. Actually the evidence discloses the petitioner was told to move three times and three times he failed to move, thus violating Sections 1231 and 1142 as amended three times.

The petitioner was not convicted on an ordinance that as applied to his conduct was vague and uncertain. The defendant has a substantive right:

> ". . . to be informed by the indictment or information in simple, understandable language of the crime he is charged with and the acts constituting the crime, in sufficient detail to enable him to prepare his defense and to be protected in the event of double jeopardy." 27 A. Jur., Section 57, p. 623.

In the instant case the complaint based upon the two ordinances sufficiently inform the petitioner of the nature of the crime and the acts he is charged with having committed in sufficient detail and manner for him to prepare

his defense and be protected from another prosecution for the same offense.

A good discussion of the certainty required of the language employed in statutes is found in 22 Corpus Juris Secundum, Section 24 (2) at page 67:

> "In determining whether a statute meets the requirement of certainty, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Absolute certainty is not required in a criminal statute, and the standards of guilt proscribed therein need not be so precise as to be capable of reduction to an exact mathematical formula or of mechanical application . . ., and a standard of conduct under statute need not be defined with such precision that those affected by it will never be required to have to hazard their freedom on correctly foreseeing the manner in which a matter of degree may be resolved by a jury . . ."

Any doubt, if there ever was any, concerning the certainty of Section 1231 was removed by the limitation placed on this section by virtue of its location in that chapter of the City Code entitled "Traffic". **Phifer v. City of Birmingham,** ... Ala. App. ..., 160 So. 2d 898. As noted in **Garner v. State of Louisiana,** 82 Sup. Ct. 248, 368 U. S. 157:

> "Whether state statutes are to be construed one way or another is a question of state law, final decision of which rests, of course, with the Courts of the State."

Under the construction placed on Section 1231 by the Appellate Court in Alabama, there is no basis left upon which to argue the vagueness and uncertainty of that section. **Phifer v. City of Birmingham,** ... Ala. App. ..., 160 So. 2d 898.

Petitioner also contends at least inferentially, that when the Alabama Court of Appeals restricted the scope of Section 1231 to traffic situations, it made its application unconstitutional as to petitioner. He implies that under authority of **Bouie v. Columbia,** ... U. S. ..., 12 L. Ed. 894 (1964), the limitation thus placed on Section 1231 was unforeseeable and therefore deprived petitioner of fair warning contrary to the "due process" clause of the United States Constitution. There is no comfort for petitioner in that case. The Court in the **Bouie case** held that the judicial enlargement of an ordinance violated the due process clause of the Constitution, and also by way of dicta held that the unforeseeable limitation by judicial construction of a vague or broad statute also failed to give fair warning and was thus a denial of due process. Your respondent submits that this statute is not and never has been subject to criticism for being vague or too broad. If Section 1231 as presently written had appeared in Chapter 35 of the City Code dealing with "Offenses—Miscellaneous", it would not have been restricted to traffic situations and would not have been so broad as to be vague. Respondent also insists that the rule of construction applied in the **Phifer case** is completely consistent with the prior decisions of the Alabama Appellate Courts and was easily foreseeable. In the case of **Philyaw v. City of Birmingham**, 36 Ala. App. 112, 54 So. 2d 619, we find the following statement of the same rule:

> "All City ordinances appearing in the same chapter of a city code are in pari materia, and must be construed together and, if possible, be interpreted so as to be in harmony. Sloss-Sheffield Steel and Iron Co. v. Allred, 247 Ala. 499, 25 So. 2d 179."

Section 1231 appears in Chapter 51 of the General Code and is entitled "Traffic." All sections in this chapter relate in some manner to traffic. The section immediately

preceding Section 1231 when construed with said section does a great deal to clarify the restriction imposed in the **Phifer case.**

"Section 1230. **Police to direct traffic; directing in event of fire or emergency.**

"It shall be the duty of the police department to enforce the provisions of this chapter. Officers of the police department are hereby authorized to direct **all traffic** either in person or by means of visible or audible signal or sign in conformance with the provisions of this chapter; provided that in the event of a fire or other emergency or **to expedite traffic or safeguard pedestrians,** officers of the police or fire department may direct traffic, as conditions may require, notwithstanding the provisions of this chapter."

It is clear when section 1231 is construed in pari materia with section 1230 and all the other sections appearing in this chapter, that it is limited to traffic situations. It is equally clear that such a traffic situation existed in this instance because pedestrians were compelled to leave the sidewalk and walk out into the street to get around petitioner and his group.

As observed in **Bouie v. Columbia,** supra, the rule petitioner seeks to invoke, is limited to an unforeseeable rule of construction which limits or restricts an otherwise vague enactment:

"The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question . . . The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we

think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitled him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment . . .' "

In this case, the petitioner was given fair warning. The construction limiting section 1231 to traffic situations is supported by the prior decisions of the State of Alabama, and the application of this ordinance in this manner was clearly foreseeable by petitioner.

Respondent respectfully submits that the opinion of the Court of Appeals of Alabama is correct in all respects and that Petitioner's application for writ of certiorari should be denied.

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W. C. WALKER,

.....

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